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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, Justice of The Illinois Supreme Court; et al; as Members of THE ILLINOIS COURTS COMMISSION; WILLIAM J. SCOTT, Attorney General of Illinois, Individually and as designated Counsel for the ILLINOIS COURTS COMMISSION; ROY O. GULLEY, Administrator of the ILLINOIS COURTS, Individually and as Permanent Secretary of THE ILLINOIS COURTS COMMISSION; and JOHN W. LEWIS, JR., as Secretary of State of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 19, 1972.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Richard A. Napolitano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 21, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is Appendix A hereto. The relevant opinion of the District Court is reported as *Napolitano* v. *Ward*, 317 F.Supp. 83 (N.D. Ill., E.D., 1970) and is Appendix B hereto.

JURISDICTION.

This action was instituted under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343, 2201, 2202 and claimed a deprivation of Petitioner's rights under the Self-Incrimination and Due Process Clauses of the Fourteenth Amendment and that Respondents acted under color of Illinois law.

The judgment of the Court of Appeals was entered on March 21, 1972. No petition for rehearing was filed and this petition for writ of certiorari is filed on or before June 19, 1972.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1.

Does Petitioner's removal, as a Circuit Judge of Cook County, Illinois, because he refused to waive his right against self-incrimination, when called to testify before a Grand Jury investigating his personal behavior, violate his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments?

2.

Where the punishment is a penalty prescribed for criminal conviction, and "appearance of impropriety" consti-

tutes the standard applied to criminally innocent personal conduct and to the refusal to waive the constitutional right against self-incrimination before a grand jury: Is the proceeding and the forfeiture of Petitioner's State judicial office repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

UNITED STATES CONSTITUTION, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 4 OF ARTICLE IV, CONSTITUTION OF ILLINOIS:

> § 4 No person who has been, or hereafter shall be convicted of bribery, perjury or other infamous crime . . . shall be eligible to the General Assembly, or to any office of profit or trust in this State.

SECTION 18 OF ARTICLE VI, CONSTITUTION OF ILLINOIS:

> § 18 . . . any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that Court, two judges of the Appellate Court selected by that Court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate.

CANON No. 4, CANONS OF JUDICIAL ETHICS:

> A Judge's *official*[1] conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everdyday life, should be beyond reproach.

STATEMENT OF THE CASE.

The Petitioner was duly elected a Judge of the Circuit Court of Cook County, Illinois, in November 1968 and was removed from that office "for cause" on July 14, 1970. The "cause" was a violation of Canon 4 of the Canons of Judicial Ethics which provides: "A Judge's . . . conduct should be free from . . . the appearance of impropriety . . . and his personal behavior . . . in his everyday life should be beyond reproach." [*supra*].

Section 18 of Article VI of the Constitution of Illinois empowers the Respondents to remove any judge "for cause". The Respondents are the five judges constituting the Illinois Courts Commission, its permanent secretary and the Attorney General designated by the Commission to formally charge and prosecute the Petitioner.

1.

The Right to Hold Office—Illinois Constitutional Scheme.

In Illinois "the right to hold office is a valuable one and its exercise should not be declared prohibited or curtailed except by plain provisions of the law", which "should be construed in favor of eligibility." [*Livingstone* v. *Ogilvie*,

1. Footnote 3 to the opinion of the Court of Appeals sets out Canon 4 but apparently overlooked the word "official". The omission is constitutionally immaterial.

43 Ill.2d 9, 17, 250 N.E.2d 138]. "No person shall be eligible for the office of judge unless he shall be a citizen and licensed attorney-at-law of this State, and a resident of the judicial district, circuit, county or unit from which selected." [ARTICLE VI, SECTION 15, CONSTITUTION OF ILLINOIS]. Section 4 of Article IV (Conviction of a Crime), Section 24 of Article IV (Impeachment) and Section 5 of Article V (Executive Officers— Ineligibility For Other Office During Tenure) are the sum total of the "ineligibility provisions" of the Illinois Constitution. [*Livingstone* v. *Ogilvie*, 43 Ill.2d at 15, 250 N.E.2d 138].

The Petitioner is fully eligible and qualified as a Judge of the Circuit Court of Cook County.

2.

The Case.

This case arises out of a five month Grand Jury investigation of the Illinois State Fair. On January 30, 1970 the Grand Jury returned indictments charging the offense of conspiracy with regard to State Fair concession contracts. The Petitioner was named as one of the conspirators.

Section 4 of Article IV of the Illinois Constitution required his office to be forfeited if and when the presumption of his innocence is removed by criminal conviction in a trial court. [*People ex rel. Keenan* v. *McGuane*, 13 Ill.2d 520, 537; 150 N.E.2d 168]. But on June 12, 1970 that possibility was precluded when the Circuit Court of Sangamon County ruled that the indictments failed to state a crime and entered judgment on behalf of the criminal defendants.

One could reasonably surmise that that would have been the end of it! But it wasn't!

Petitioner's office was forfeited on July 14, 1970, because his criminally innocent State Fair conduct had been com-

plicated by the Self-Incrimination Clause of the Constitution in tandem with the "Appearance of Impropriety" Clause of the Canons of Judicial Ethics. [Canon 4, *ante*, p. 4].

Judge Napolitano was not indicted on January 30, 1970. He was merely named as a non-indicted co-conspirator. When he was subpoenaed by the Grand Jury, he had claimed his constitutional right of silence, was granted statutory immunity [Ill. Rev. Stat., Chap. 38 §§ 106-1, et seq.] and compelled to testify about the State Fair matters.

February 5, 1970, Respondents received a letter from the Chicago Bar Association, which, in relevant part, stated:

> The Board of Managers of the Association took note at its meeting today of the report that Circuit Judge Richard A. Napolitano invoked the Fifth Amendment when called upon to testify in a Grand Jury investigation in Sangamon County.
>
> While this action by Judge Napolitano may be entirely within his constitutional rights, it is quite evident that such action will not contribute to public confidence in the judiciary and that it is particularly unfortunate at a time when the respect for our judicial system seems to be at a low ebb.[2]

• • • • •

Petitioner was suspended and Respondents' disciplinary powers were invoked "In the matter of Judge Richard A. Napolitano's conduct in his invocation of the privilege against self-incrimination before the Sangamon County Grand Jury."[3]

The Attorney General was designated and he filed a formal complaint on March 19, 1970. It charged appear-

2. The parties agree the facts are not in dispute. Thus, the references to the record are omitted and at this juncture, references to the "Statement of Fact" — Appellant's Brief [(7 Cir.), page 11].

3. Appellant's Brief (7 Cir.) [page 13].

ance of impropriety in violation of Canon 4, [*ante*, p. 4] and alleged the following as constituting conduct unbecoming of a judge:

> 1. That on or about September 1, 1969, the Sangamon County Grand Jury commenced an inquiry into possible wrongdoing in connection with the Illinois State Fair, which inquiry eventuated on January 30, 1970, in the filing of indictments numbers 317-70 and 320-70 alleging official misconduct in connection with the 1968 and 1969 State Fairs. These indictments allege the participation of respondent in said misconduct, though respondent is not named as a defendant therein.
>
> 2. That on or about January 29, 1970, the respondent appeared as a witness before the September Grand Jury, Sangamon County, Illinois, and in response to inquiries directed to him before said jury, the respondent invoked his constitutional privilege against self-incrimination in support of his refusal to answer questions concerning the Illinois State Fair, and any possible wrongdoing on his part in connection therewith.
>
> 3. That respondent, accompanied by and speaking through counsel, appeared before the Honorable William H. Chamberlain, Judge of the Circuit Court of Sangamon County, on January 29, 1970, and in open court stated that he had invoked his constitutional privilege against self-incrimination in connection with the Grand Jury inquiry into the Illinois State Fair and his possible wrongdoing in connection therewith. Upon motion of the State's Attorney of Sangamon County, Richard A. Hollis, and without objection, respondent was granted immunity by the court in accord with the provisions of Article 106, Chapter 38, Illinois Revised Statutes, and on information and belief, testified at length before the said Grand Jury thereafter.[4]

On July 14, 1970, Respondents ordered Petitioner removed from office because of the "appearance of impro-

4. Appellant's Brief (7. Cir.) [page 15].

priety" in violation of Canon 4 [*ante*, p. 4]. The Courts Commission findings follow the paragraphs of the foregoing complaint.

Petitioner had previously requested injunctive relief restraining all further disciplinary proceedings which the District Court denied on July 2, 1970. The federal claim is and has been that the foregoing complaint violates Petitioner's rights under the Fifth and Fourteenth Amendments in that it is based "on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County grand jury". The District Court declared that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one" [317 F. Supp. at 85 (App. 11)], dismissed the complaint with prejudice and entered judgment in favor of Respondents.

The judgment of the District Court was affirmed by the Court of Appeals, who held, in short, as follows: that a State is not constitutionally required to allow a judge to remain in office [*Snowden* v. *Hughes*, 321 U.S. 1]; that Canon 4 of the Canons of Judicial Ethics, which forbids personal behavior constituting the appearance of impropriety, imposes a constitutionally permissible condition on the right to hold State judicial office; and thus, a judge who exercises his right against self-incrimination under circumstances constituting the appearance of criminality may be removed from office [App. 7 through 8].

REASONS FOR GRANTING THE WRIT.

The questions presented raise substantial issues concerning the imposition of ethical norms on public officials and whether mandatory canons of ethics can be enforced under concepts consistent with "Justice Under Law".

1.

The Decisions and Opinions Below Conflict with the Decisions of the Supreme Court of the United States.

A.

In reliance upon what it conceived to be the principles established by *Snowden* v. *Hughes*, 321 U.S. 1, the Seventh Circuit has here held that "impropriety" or "appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics, imposes a constitutionally permissible condition on the right to hold Illinois judicial office and that a person who exercises his constitutional right of silence while a member of the judiciary may be removed from office. [See *ante*, p. 9]. Realistically and analytically this means that a judge is excepted from the constitutional mandate that "no person shall be compelled in any criminal case to be a witness against himself". And this means that a judge does not enjoy the constitutional "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. at 8.

In so holding, the Seventh Circuit has virtually emasculated the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments and in the process, overruled all relevant decisions by this Court which construe and apply them.

At bottom, of the rejections of Petitioner's constitutional claims below, is the proposition that "a state is not required to allow a judge to occupy a state judicial office" because "the privilege is one granted by a state, not a right secured by constitutional mandate." *Napolitano* v. *Ward* ..... F. 2d ..... (7 Cir., App. 7).

Long, long ago this Court said that no government may

"impose conditions which require the relinquishment of constitutional rights". *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 594. Because; as the *Frost* case declares: "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all" and it is "inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." See and compare: *Gomillion* v. *Lightfoot*, 364 U.S. 339.

Petitioner's claim transcends the mere assertion of an abstract right to be a Judge of the Circuit Court of Cook County. His claim is that the Respondents have exploited their state power over his "privilege of occupying such an office" and thereby denied him the full enjoyment of rights specifically secured to him under the Fifth and Fourteenth Amendments to the Federal Constitution. The question here is identical to that in *Bond* v. *Floyd*, 385 U.S. 116; "whether the Georgia House of Representatives may constitutionally exclude . . . Bond, a duly elected Representative from membership because of his statements, and statements to which he subscribed." [385 U.S. at 118.] The Court held: "that the disqualification of Bond from membership in the Georgia House because of his statements violated Bond's right of free expression under the First Amendment." [385 U.S. 137.] The District Court there "reasoned that Bond's right to dissent as a private citizen was limited to his decision to seek membership in the Georgia House." [385 U.S. at 127.] And here, the District Court reasoned that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law" and thus, his "reluctance to aid in a grand jury investigation of (his) suspected criminal

activity" while a member of the judiciary constitutes disqualification for his judicial office.[5] [App. 11.]

B.

Moreover, the opinions and decisions below contradict *Boyd* v. *United States*, 116 U.S. 616; *Malloy* v. *Hogan*, 378 U.S. 1; *Gardner* v. *Broderick*, 392 U.S. 273 and their progeny. And with regard to their destructive impact on the future free will of other judges who may be chosen as the penal object of an inquiry in quest of the crime they defeat the principles of *Garrity* v. *New Jersey*, 385 U.S. 473.

Boyd v. *United States*, holds that the sole concern of the privilege "is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal act'."[6] In the *Malloy* case, the privilege is declared as the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U.S. at 8. And in *Gardner* v. *Broderick*, the question was "whether a State may discharge an officer for refusing to waive a right which the Constitution guarantees to him;"—the Court held that "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." 392 U.S. at 277, 279.

---

5. The paradox emerges when a judge considers that his constitutional right is limited only when his official conduct is not being investigated. A judge, like legislator and executive, is under mandatory and absolute immunity when the inquiry—civil or criminal—concerns official conduct. See e.g. *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir., 1949); *United States* v. *Johnson*, 383 U.S. 169 (affirming 337 F.2d 180).

6. As stated in *Kastigar* v. *United States*, ... U.S. ...., 40 U.S.L.W. at 4554, quoting *Ullmann* v. *United States*, 350 U.S. 422, 438-439, quoting *Boyd* v. *United States*, 116 U.S. at 634.

By these standards the judgments below cannot stand scrutiny. The determination that while "the state may not draw an inference of guilt from (a judge's) exercise of his constitutional right of silence, it may rightfully be dismayed at the lack of candor and cooperation manifested thereby" [317 F.Supp. at 85 (App. 11)] is an affront to logic. And the conclusion that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law" [*ibid.*] is "to view a particular provision of the Bill of Rights with disfavor" and to thus, "disrespect the Constitution." *Ullmann* v. *United States*, 350 U.S. at 428. The decision and the critical fact remains that Petitioner was brought to discipline because he "invoked the Fifth Amendment when called upon to testify in a Grand Jury investigation in Sangamon County" [See: *ante*, p. 6] and removed from office under the following circumstances:

1. As a non-indicted co-conspirator protected by the Illinois Immunity Act in exchange for his testimony concerning the conduct charged in the indictments.

2. After the conduct charged in the indictments was adjudicated innocent and after judgments were entered in favor of the indicted conspirators.

3. When the penalty inflicted was one affixed to the criminal conduct charged in the indictments and adjudicated innocent per paragraph 2, *supra*.

In sum, Petitioner was removed from office because he wasn't indicted and he wasn't indicted because he claimed his constitutional right of silence. Any contrary conclusion requires an assumption we cannot indulge. We will not presume that the Honorable Judges constituting the Illinois Courts Commission would have instituted forfeiture for the appearance of impropriety simply because

petitioner was charged by unfounded indictment and then acquitted on the face thereof. Professor Levy ["ORIGINS OF THE FIFTH AMENDMENT" (Oxford Press N.Y., 1968), page 15] declares that the Inquisitions were a natural outgrowth of what preceded, viz:

> Treating an accusation as a conviction,[7] when an accusation was little more than an expression of popular opinion, was a makeshift that fell so short of doing justice that it could not survive.

Unless the constitutional mandate that "no person shall be compelled in any criminal case . . ." lends itself conceptually or in practice to some hidden exception as to judges, the *Boyd, Malloy* and *Gardner* cases are offended by the opinions and judgments below.

For whatever the reason, the Seventh Circuit chose to emphasize the Appearance of Impropriety and Personal Behavior Above Reproach Clauses of Canon 4 of the Canons of Judicial Ethics. It emphasized that the Canon is predicated on the proposition that "both the personal and professional behavior of a judicial officer" is within the scope of official "conduct in the courtroom." [App. 7]. Unless this Court grants the writ, the decision of the Court of Appeals constitutes high federal authority that the A.B.A. Canons of Judicial Ethics may "subject a judicial officer to discipline or removal" should he claim his rights

---

7. Section 4 of Article IV of the Constitution of Illinois [See: *ante*, p. 3] was construed with regard to "conviction" [*People ex rel. Keenan* v. *McGuane*, 13 Ill.2d at 537] as follows:

> While neither the constitution nor the statutes effecting its purpose define the term "conviction," yet respect for the law and deference to the transcendent trust placed in public officials requires that such officer forfeit his office after the presumption of his innocence is disspelled by conviction of an infamous crime in a trial court. We conclude that the provisions of the Illinois constitution and statutes effecting a vacancy in public office upon the conviction of the incumbent of an infamous crime refer to the conviction in a trial court.

under the command that "no person shall be compelled in any criminal case to be a witness against himself".

Canon 4, as so construed and applied, operates precisely as the New York law declared invalid in *Gardner* v. *Broderick*, 392 U.S. at 279 and as the New Jersey statute whose thrust was held to constitute sufficient coercion to render a confession unlawful in *Garrity* v. *New Jersey*, 385 U.S. 473.

The thrust of Canon 4, as applied by the Illinois Courts Commission and as constitutionally approved by the Seventh Circuit, is to remove any constitutional impediment to self-incrimination when a member of the judiciary is under criminal investigation for any reason. The hapless judges who are among the future legions marked to aid a grand jury in quest of his crime have one of two alternatives: (1) waiver of his immunity and self-incrimination, or (2) forfeit his judicial office under the appearance of criminality.

If there be compelling reasons why members of the judiciary must be subjected to this kind of Hobson's choice, those reasons should be declared by no less than this Court. But, as things now stand, *Garrity* v. *New Jersey*, holds that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." 385 U.S. at 499.

C.

Prior to January 1970 Illinois had no statute prohibiting judges or other people from invoking the privilege against self-incrimination and Canon 4 of the Canons of Judicial Ethics had no known standing as an enforceable statute —

and nowhere had it been construed or used to supersede or suspend the Self-Incrimination and Due Process Clauses of the Federal Constitution. The only relevant decisional law was *In re Holland*, 377 Ill. 346; 36 N.E. 2d 543 (1941) which involved a disciplinary proceeding because the judge, when called before a grand jury investigating non-judicial conduct, refused to sign an "immunity waiver". His removal was before the Supreme Court of Illinois and the contention was "that since respondent is a judge his right to retain his license as a lawyer is subjected to additional or increased obligations to assist in the investigation conducted by the grand jury."[8] 36 N.E. 2d at 545. The Court discharged the rule and declared, *inter alia:* "The late Mr. Justice Cardozo in his Paradoxes on Legal Science, page 48, makes the statement that where government makes a declaration of right, such is "the admission by organized society that the claim is justified from the public point of view. That principle may be applied in a case of this kind. The right given by the constitution being legal, is as well a moral right, since the public point of view can scarcely be said to include that which is not moral." 36 N.E. 2d 547.

Thus, when Petitioner appeared before the Grand Jury the relevant Illinois law was:

1. Section 18 of Article VI of the State Constitution provided "any judge may be . . . removed for cause, and

2. Section 4 of Article IV of the State Constitution [*ante*, p. 3] provided that an officer is required to

8. This is precisely the standard applied by the District Court, [317 F.Supp. at 85 (App. 11)] viz:

> The spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law. Unwillingness to fulfill that duty, as shown by reluctance to aid in a grand jury investigation of suspected criminal activity, may properly be considered to be evidence of a disregard for this obligation.

forfeit his office "after the presumption of his innocence has been dispelled" by criminal conviction in the trial court. *People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d at 537, 150 N.E. 2d 168.

Respondents' complaint, filed on March 19, 1970 [quoted, *ante,* p. 7] was to punish the exercise of the constitutional right of silence.

Without getting into the niceties of whether Respondents' proceeding was a legislative Bill of Attainder or a decree of Attainder and *post facto* judgment, the actual impact on Petitioner embodies the vices of vagueness, overbreadth, attainder and *post facto* infliction of punishment. Nothing could be clearer than the fact that the Petitioner was singled out and made the punitive object of a newly created offense — *post facto* — and summarily removed from office[9] under circumstances which the State Constitution prescribed as requiring proof beyond a reasonable doubt of every element necessary to constitute the crime charged. This is constitutionally prohibited and the proscription is so clearly plain that reference to Article, Amendment, Section or Clause is superfluous. But see e.g.: *Cummings* v. *Missouri,* 4 Wall 277; *Ex parte Garland,* 4 Wall 333; *United States* v. *Lovett,* 328 U.S. 303

In the judicial context, an *ex post facto* judgment or decree is prohibited under the Due Process Clause of the Fourteenth Amendment. *Bouie* v. *Columbia,* 378 U.S. 347, 355. As stated in *Bouie:* "When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person *to criminal liability for past conduct,* the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime"; thus, "if the result above stated were attained by an exercise of the State's legislative

9. Respondents' complaint [*ante,* p. 7] states historical fact which Petitioner could not and did not deny.

power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious" and "the application is none the less clear when that result is accomplished by the state judiciary in the course of constructing an otherwise valid . . . state statute."

In essence, but under the guises of the appearance of impropriety, Petitioner was inflicted with a penalty which would have affixed had he been criminally convicted in a trial court. But his criminating course of conduct was not only constitutionally immune, it had been adjudicated non-criminal in the criminal proceeding itself. In *Giaccio* v. *Pennsylvania*, 382 U.S. 339, Mr. Justice Stewart (concurring) condemned a similar Pennsylvania result of imposing costs on a criminally acquitted defendant and declared "it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That I think, violates the most rudimentary concept of due process of law." 382 U.S. at 405. The Court took a narrower view and held: "It would be difficult if not impossible for a person to prepare a defense against such abstract charges as 'misconduct' or 'reprehensible conduct'. If used in a statute which imposed forfeitures, punishments or judgments for costs such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. * * * We hold that the 1860 Act is constitutionally invalid both as written and as explained by the . . . Courts." 382 U.S. at 404. Under either view, the use and application of Canon 4's "impropriety" or "appearance of impropriety" standard as constituting cause justifying Petitioner's removal from office cannot pass muster. And the decision below holding that such "general abstract" charges are a constitutionally permissible basis for the forfeiture are in direct conflict with this Court's holdings.

But, the root, the branch—the essence of this case is,

as stated by the Chicago Bar Association; "the report that Circuit Judge Richard A. Napolitano invoked the Fifth" and while "entirely within his constitutional rights . . . such action will not contribute to public confidence in the judiciary." By instinct, the cross-examiner would ask—Why? And, regardless of answer, proceed to develop the inquiry to its natural conclusion—that a judiciary which subjectively sees malevolence in a specific constitutional provision, is not very likely to apply it objectively when judging others.

Perhaps the most relevant due process case is *Slochower v. Board of Education of New York*, 350 U.S. 551. Professor Slochower was removed from State employment simply because he claimed the right of silence at a time and under circumstances when the right could not be constitutionally conditioned. The State contended that the mere exercise of the right constituted the appearance of guilt. The Court held that "since no inference of guilt was possible . . . the discharge falls of its own weight as wholly without support. There has not been the protection of the individual against arbitrary action which Mr. Justice Cardozo characterized 'as the very essence of due process'." 350 U.S. at 559. The Court reasoned: (1) "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent . . . to a confession of guilt" [350 U.S. at 557]; (2) "the classification of innocent and guilty together was arbitrary" [350 U.S. at 556]; and thus (3) "the discharge falls of its own weight as wholly without support."

The same premises are stronger here and thus, the conclusion of wholly arbitrary action is undeniable. Petitioner's removal must be tested by this logic: (1) his suspected conduct concerning State Fair contracts has been held criminally innocent in the court of criminal jurisdiction; (2) classification of the innocent and guilty to-

gether is arbitrary; and thus (3) the forfeiture must fall of its own weight and "there has not been the protection . . . against arbitrary action which Mr. Justice Cardozo characterized as the very essence of due process." [*supra*, at 559.]

These conflicts with the enumerated, and other, decisions of this Court justify the grant of certiorari to review the opinions and judgment below.

2.

The Decisions Below Raise Significant and Recurring Problems Concerning Efforts to Create and Control the Ethics of Judges and Other Public Officers.

A.

The opinions and decisions below reflect important and difficult considerations growing out of current efforts to impose enforceable ethic standards on governments rooted in the rule of law. This case presents that problem, it is timely and overripe for adjudication.

This case is not the only contemporary instance of a judicial vacancy under the lash of "appearance of impropriety". But it does so happen that this case presents the problem in a justiciable context—most such forfeitures occur by resignation. This is a substantial reason why the writ should be granted. "Almost every generation;" Professor Philip Kurland[10] asserts: "has raised the question . . . whether . . . judges are removable . . . for cause other than the commission of 'high crimes and misdemeanors'," yet, he says: "the issue has never been successfully framed for a definitive resolution by the Supreme Court." and thus "those who would bestow a monopoly of constitutional con-

10. Professor of Law, University of Chicago.

struction on the Court have had to face the problem without adequate judicial authority on which to rest argument."[11]

In 1969 the American Bar Journal rested an editorial on Canon 4 of the Canons of Judicial Ethics[12] and the Appearance of Impropriety Clause, speculating that "it was *the possible impropriety that appeared* in the conduct of Justice Fortas, rather than any wrongdoing" that caused the problem.[13]

The Seventh Circuit, the highest federal judicial authority in absence of action by this Court, now holds that "Canon 4 of the Judicial Canons of Ethics, is based upon the premise that both the personal and professional behavior of a judicial officer are relevant to his qualification" and "any violation . . . subject the judicial officer to discipline or removal." [App. 7]. The scope of the overbreadth of any such standard would be uncomprehensible but for what has happened to the Petitioner whose only crime, it seems, has been to insist upon the indignity of "adjudication" rather than the self-imposed infamy of resignation. *Tri-partite* and dual sovereigns notwithstanding, the strongest restraint on arbitrary power is our commitment to the rule of law. This is the restraint inherent in the nature of the judicial power, aptly defined by Justice Holmes as that which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226.

The problem we perceive with the adjudication of apparent offenses is that its administration constitutes the

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11. Kurland, THE CONSTITUTION AND THE TENURE OF FEDERAL JUDGES: SOME NOTES FROM HISTORY, 36 U. of Chgo. L. Rev. 665.

12. Canon 4 approved by the Seventh Circuit—the one here involved [*ante*, p. 4]—is Canon 4 of the A.B.A. Canons of 1924.

13. 55 ABAJ 648 (1969).

appearance of justice. Lady Justice without her blindfold is a stranger at the threshold where "Equal Justice Under Law" is engraved above.

B.

Yet, Petitioner has been branded by governmentally imposed infamy and a United States Court of Appeals has stamped it with the imprimatur of the Constitution of the United States. Justification in the name of ethics, or by the nature of the judicial office or in the name of public confidence are conclusions unsupported by the proofs—even more important, they are conclusions which must fall given the substance of "the ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause'." [*In re Larsen*, 86 A.2d 430, 435 (N.J., 1952) Brennan, J. concurring].

C.

The Seventh Circuit opinion and judgment presents a number of unanswered questions. For example:

1. What of First Amendment freedoms—as the vehicles by which appearances leading to penal sanction are created, does the instinct of self-protection and the exercise of judicial power constitute a future threat to their free exercise? There are unfortunate comparatives—The Sedition Laws are one.

2. Can it be said that the judiciary is less likely to judge as it is judged than other men might be?

In sum, the substantiality of the questions is the substance of the Constitution. The following excerpt from the Author's Preface "*Man on Trial*"[14] is relevant to the case at hand and why the writ should be granted.

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14. Dickler, "*Man on Trial*" (Doubleday & Company, Inc., N.Y. 1962) page 7.

"The trials recorded in these pages have been selected for the imprint they left upon Western history, and the illumination they cast upon their own troubled times. Each represents a phenomenon seldom seen and generally unrecognized, which makes its appearance when society is at war with itself, when fresh ideas and new values are being born on the tangled bed of social upheaval.

In such periods of tension, the forces dominating the community display a remarkable propensity for resorting to the judicial process to relieve themselves of their ideological bellyaches. Assassination or lynching or some less drastic but equally expeditious disposition of the problem might well have served, without fear of retribution; yet in each instance judicial machinery is rolled ponderously into place (or invented if it does not exist), the ceremonials observed with due solemnity, often at unnecessary length, and if nothing goes amiss, the prevalent political or religious principle is suitably embalmed as truth.

In these cases, the trial may be seen as an aspect of mankind's dependence on ritual. Specifically, the ritual employed is that of expurgation—to rid the body politic of an irritant, an alien substance, or a poison. Without inviting odious comparison, it may be said that Stalin and Cromwell, for example, shared an instinctive need for judicial endorsement of their bloodlettings, although each held absolute sway in his realm. Ironically, in the eye of history these trials failed to cure the maladies for which they were prescribed."[15]

The Petitioner's personal plight should not be forgotten. The penalty imposed is governmentally inflicted infamy whose consequences are historically documented. The stain should be removed by declaration of the Supreme Court of the United States. In addition, Petitioner is entitled to

15. Included in the Index of Contents are these "Trials": Jesus, Salem Witchcraft Trials, Andrew Johnson, The Dreyfus Case, The Reichstag Fire Trial, The Moscow Trials, The Nuremberg Trial, The Oppenheimer Hearing.

restoration of his State and Federal Civil Rights including substantial back pay and pension benefits.[16] Petitioner has exhausted all other sources for judicial relief and thus, to be vindicated, he prays that this Court grant certiorari and plenary consideration.

Petitioner's plea is well beyond the hypothetical stages referred to, in a different context, by Mr. Chief Justice Burger [*Cole* v. *Richardson* ____ U.S. ____, 40 U.S.L.W. at 4384] as follows:

> Those who view the Massachusetts oath in terms of an endless 'parade of horribles' would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur 'while this Court sits.' *Panhandle Oil Co.* v. *Knox*, 277 U.S., at 233 (Holmes, J., dissenting).

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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309/676-0591,
Peoria, Illinois 61602,
Attorney for Petitioner.

16. Although it is overlooked by the Seventh Circuit's opinion, the March 26, 1971 District Court order dismissing the suit with prejudice also denied Petitioner his request for leave to amend.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term 1971 — January Session 1972

No. 71-1444

RICHARD A. NAPOLITANO,
Plaintiff-Appellant,

vs.

HON. DANIEL P. WARD, Justice of the Illinois Supreme Court, et al.
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-1597
JOSEPH SAM PERRY,
Judge.

March 21, 1972

Before DUFFY, *Senior Circuit Judge,* STEVENS, *Circuit Judge* and GRANT*, *District Judge.*

DUFFY, *Senior Circuit Judge.* This is an appeal from a judgment of the District Court dismissing plaintiff's amended complaint and his cause of action.[1]

The plaintiff-appellant was duly elected a Circuit Judge, Cook County, Illinois, in 1968. He was removed from office

*Chief District Judge Robert A. Grant of the Northern District of Indiana, is sitting by designation.

1. The District Court's findings and conclusions may be found in the Memorandum Opinion and Order as *Napolitano* v. *Ward,* 317 F. Supp. 83 (N.D.Ill., 1970).

"for cause" by the Illinois Courts Commission[2] on July 14, 1970.

The instant suit is based on the Civil Rights Act (42 U.S.C. § 1983) and 28 U.S.C. §§ 1343, 2201 and 2202. The defendants are the five judicial members of the Illinois Courts Commission, its secretary and the Attorney General of Illinois.

Plaintiff claims that his removal from the office of Circuit Judge, under color of Section 18 of Article VI of the Illinois Constitution and Rule 51, Rules of the Supreme Court of Illinois, deprived him of his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments, United States Constitution.

In September 1969, the Sangamon County, Illinois Grand Jury began an investigation into charges relating to the administration and management of the Illinois State Fair. Judge Napolitano was called as a witness by the Grand Jury. On advice of counsel, he refused to answer any questions as to his business dealings with the State Fair on the ground that any answers might tend to incriminate him.

Upon motion of the State's Attorney, Judge Napolitano was granted full transactional immunity in return for his testimony before the Grand Jury.

In his testimony before the Grand Jury, Judge Napolitano outlined his business dealings with the State Fair Management. This testimony related to the procedures whereby appellant secured 42 contracts for concession space at the

2. The Illinois Courts Commission was vested with the power to discipline or remove a state judicial officer for cause under Article VI, Sec. 18 of the Illinois Constitution (1870). Rule 51 of the Illinois Supreme Court implemented this constitutional provision by convening the Courts Commission and establishing its procedural rules. The Commission is composed of five state judges from various state courts.

State Fairs for each year of 1961 to 1969. The appellant usually sublet most of the locations but kept nine or ten spaces for himself.

The Grand Jury returned several indictments charging various State Fair officials with official misconduct and conspiracy. The appellant was named as a non-indicted co-conspirator.

At the direction of the Supreme Court of Illinois, appellant was relieved of all assignments on February 5, 1970. On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against the appellant. This was done on March 19, 1970, charging him with impropriety and the appearance of impropriety in violation of the Canon of Judicial Ethics.

Beginning July 7, 1970, a formal hearing was had before the Illinois Courts Commission on these charges. Appellant was present and was represented by counsel. Documentary evidence, including the transcript of appellant's testimony before the Grand Jury, was considered.

On July 14, 1970, the Courts Commission found the evidence to be clear and convincing that appellant's conduct "... violates applicable Canons of Judicial Ethics including Canon 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office."[3]

An appeal was taken from this decision to the Supreme Court of Illinois. That Court held that the right of appeal

3. Canon 4 of the Canons of Judicial Ethics provides, "A Judge's conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

to that Court did not exist, holding the proceedings before the Commission to be *sui generis.*

Appellant then attempted to appeal to the Supreme Court of the United States. That Court dismissed the appeal for want of a federal question. *In re Napolitano,* 401 U.S. 971 (1971), Justice Brennan would have dismissed the appeal for want of jurisdiction.

Prior to the hearing before the Illinois Courts Commission, appellant filed a motion with the United States District Court, Northern District of Illinois, for a temporary restraining order to prevent the Commission hearing, and further requesting the convening of a three-judge court, alleging a violation of his civil rights.

The motion for a temporary restraining order was denied by the single Judge before whom the suit was filed.

A three-judge panel was convened and affirmed the dismissed of denial of the temporary restraining order. The three-judge panel then terminated the panel and remanded the case to the single judge for a determination of the factual issues raised in the complaint. *Napolitano* v. *Ward,* 317 F.Supp. 79 (N.D.Ill., 1970).

On March 26, 1971, the District Court dismissed appellant's amended complaint with prejudice and entered judgment in favor of defendants-appellees (317 F. Supp. 83). It is from this order that the appellant now appeals.

On this appeal, appellant asserts his primary argument before us is "for Declaratory Relief under 28 U.S.C. § 2201 and then such further relief as will vindicate the injury to plaintiff and redress defendants' violations of the Constitution of the United States."

The principal issue before us is whether the conduct for which appellant was removed from office may be established by the Courts Commission from the use of his

testimony before a Grand Jury compelled by a grant of full transactional immunity.

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege against self-incrimination thus protects an individual from being a witness against himself in a criminal matter and is applicable to the states through the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). The privilege may be invoked in any proceeding against an individual, either civil or criminal, in which testimony or evidence is requested of that individual which could expose him to later criminal prosecution.

The thrust of the Constitutional privilege against self-incrimination has two interrelated objectives, "The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit use in a criminal trial of self-incriminating statements elicited by compulsion." *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 57 n.6 (1964). The privilege is directed at insulating an individual from criminal penalties imposed from testimony or evidence said individual was compelled to give, either by physical or mental coercion, *Bram* v. *United States*, 168 U.S. 532 (1897), or by threat of contempt, *Brown* v. *Walker*, 161 U.S. 591 (1896).

However, the Constitution permits the compulsion of otherwise self-incriminatory testimony if the witness has been granted immunity coextensive with the Fifth Amendment privilege. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Brown* v. *Walker*, *supra*; *Ullmann* v. *United States*, 350 U.S. 422 (1956); *Murphy* v. *Waterfront Commission of New York Harbor*, *supra*. In *Brown*, *supra*, the Supreme Court upheld a complete transactional immunity statute relying on the fact that under the chal-

lenged statute, a witness testifying under compulsion "operates as a pardon" for any crimes revealed by his testimony.

In *Ullmann* v. *United States, supra,* Mr. Justice Frankfurter, in an opinion for the Supreme Court, upheld a transactional immunity statute. The Court responded at page 514 to petitioner's argument that the immunity granted by the Government was not coextensive with the constitutional privilege replaced:

> "The complete answer to this is that in safeguarding him against future federal and state prosecution 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker,* 161 U.S., at 601, compares immunity statutes to the traditional declarations of amnesty or pardon, but neither in that opinion or elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions."

Ill. Rev. Stat., 1969, Chap. 38 Sec. 106-1 provides that "in any investigation before a Grand Jury . . . the Court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce."

It is evident from the facts presented upon appeal that appellant was appropriately insulated from future Illinois criminal prosecution as a consequence of his testimony before the Grand Jury. Immediately after his testimony, various State Fair officials were indicted for their activities concerning State Fair Concession contracts. Appellant was named as an unindicted co-conspirator resulting from his dealings with State Fair concession contracts, but he never was or has been subjected to criminal prosecution

for "any transaction, matter or thing" arising from the immunized testimony.

Furthermore, appellant was not subjected to prosecution under federal law following his immunized testimony. Therefore, the transactional immunity conferred by the State of Illinois upon the appellant is consistent with the mandate of *Counselman, supra,* that absolute immunity from prosecution must be granted before the Government or other political entity can compel a witness to testify.

We hold that the transactional immunity granted appellant by the State of Illinois was coextensive with his Fifth Amendment privilege against self-incrimination.

A related question raised on this appeal by appellant is whether the hearing before the Courts Commission and his subsequent removal from office constituted a penal aspect of criminal proceedings, thereby transcending his transactional immunity.

While appellant has admitted the validity of the "for cause" standard of removal as applied to his case and so aptly applied by the District Court in *Napolitano* v. *Ward,* 317 F. Supp. 79 (N.D.Ill., 1970), he has attempted to distinguish the "for cause" standard applied to his behavior on the bench from his personal behavior apart from his judicial duties.

Canon 4 of the Judicial Canons of Ethics, is based upon the premise that both the personal and professional behavior of a judicial officer are relevant to his qualifications to act as a judge. Any violation of these Canons subject a judicial officer to discipline or to removal following proper due process requirements.

A state is not required to allow a judge to occupy a state judicial office, *Snowden* v. *Hughes,* 321 U.S. 1 (1944). The privilege of occupying such an office is one granted by a state, not a right secured by constitutional mandate.

It is clearly evident from the pertinent Court decisions that a state may require a public servant to account for the performance of his duties upon pain of dismissal, providing the judicial officer or state employee is accorded the full protection of the Fifth Amendment privilege against self-incrimination.

Furthermore, conduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause. The District Court so found herein. See *Friedman* v. *Court on the Judiciary of New York*, 375 U.S. 10 (1963); *Sarisohn* v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E.D.N.Y., 1967); *Matter of Osterman*, 13 N.Y. 2d a (1963), cert. den. *Osterman* v. *Court on the Judiciary of the State of New York*, 376 U.S. 914 (1964).

Appellant's contention that he was removed for only his personal behavior is not supported from the record of this case and the pertinent Canons of Judicial Ethics. We feel the framers of the Canons were of the view that separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible.

Here appellant has been accorded every possible protection guaranteed by the Fifth Amendment. The hearing before the Illinois Court Commission afforded him a fair hearing as required by law. He has suffered no criminal punishment resulting from his immunized testimony nor was the removal herein a penal aspect of criminal proceedings.

We hold the procedures by which appellant was removed from the office of Circuit Court Judge of Cook County, Illinois, are in accord with the requirements of the Fifth Amendment.

The order and the judgment of the District Court hereinbefore discussed is

AFFIRMED.

APPENDIX B.

NAPOLITANO v. WARD

Cite as 317 F.Supp.83 (1970)

MEMORANDUM OPINION AND ORDER

PERRY, *District Judge:*

Plaintiff Richard A. Napolitano was removed from the office of Cook County Circuit Judge by the Illinois Courts Commission on July 14, 1970. The instant action, founded on the Civil Rights Act, 42 U.S.C. § 1983, names as defendants the members of said Courts Commission and other State officials and charges that plaintiff's removal violated constitutionally protected rights. Presently before the court is plaintiff's motion for a preliminary injunction to prevent the nomination of judicial candidates to fill the vacancy caused by his removal. The last day on which such nominations can be made is August 11, 1970.

[1] The factors to be considered in determining whether or not preliminary equitable relief shall issue are by now well established. The court must consider whether the injury complained of is irreparable, Crossbow, Inc. v. Glovemakers, Inc., 265 F.Supp. 202, 205 (N.D.Ill. 1967), whether the plaintiff is likely to prevail on the merits, Tele-Controls, Inc. v. Ford Industries, Inc., 388 F.2d 48, 50 (7th Cir. 1967), whether the temporary relief requested is equivalent to that ultimately sought, Blaich v. National Football League, 212 F.Supp. 319, 320 (S.D.N.Y.1962), and whether the effect of an injunction would be to alter, rather than preserve, the status quo, Local 453, Int'l Union of Electrical, Radio and Machine Workers v. Otis Elevator Co., 201 F.Supp. 213, 215 (S.D.N.Y.1962). Assuming that

the injury plaintiff will suffer absent a preliminary injunction is irreparable, this court has concluded that the other pertinent factors weigh so heavily against the exercise of equitable powers at this time that the motion for a preliminary injunction must be denied.

With regard to the likelihood that plaintiff will prevail on the merits, it appears that he raises four independent constitutional issues. His first contention, that the standard for removal of judges set out in Article VI, Section 18 of the Illinois Constitution, S.H.A. is unconstitutionally vague and overbroad, was decided adversely to him by a three judge court on July 31 of this year.

Plaintiff's second constitutional challenge is that his removal violated the Fifth Amendment because it was based in part on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County grand jury in January, 1970. But it has never been the law that no consequences may attend the exercise of this privilege. See Harlan, J., dissenting in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). And although that case established that an attorney may not be disbarred for invoking this privilege, the law is different with regard to removal of public employees. In Gardner v. Broderick, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968), the Court stated that the Spevack rule was inapplicable to a policeman:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties * * * the privilege against self-incrimination would not have been a bar to his dismissal."

The rationale given for this distinction, that a policeman as a public employee owes his entire loyalty to the state, whereas an attorney does not, is equally applicable to a

judge.[1] The public has a right to inquire whether a member of its judiciary, invested with a public trust, is worthy of that trust. And although the state may not draw an inference of guilt from his exercise of his constitutional right of silence, it may rightfully be dismayed at the lack of candor and cooperation manifested thereby.

[2] The spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law. Unwillingness to fulfill that duty, as shown by reluctance to aid in a grand jury investigation of suspected criminal activity, may properly be considered to be evidence of a disregard for this obligation. See In Re Sarisohn, 27 A.D.2d 466, 280 N.Y.S.2d 237, 243 (1967), rev'd. on other grounds, 21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276, holding that a judge's refusal to answer questions at a removal proceeding constitutes cause for removal.

After plaintiff exercised his privilege against self-incrimination, he was granted immunity from prosecution based on any testimony he might give thereafter before the grand jury. His third allegation of a constitutional violation is that reliance upon his testimony as establishing cause for his removal violated his privilege against self-incrimination. But the Fifth Amendment in terms states only that "(n)o person shall be compelled in any criminal case to be a witness against himself * * *," and it seems apparent that the Courts Commission proceedings do not qualify as a "criminal case." The Commission is not empowered to impose either imprisonment or a fine; its

1. Although In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941), can be read to mean that a judge cannot, consistently with the Illinois Constitution, be disciplined for exercising his privilege against self-incrimination, the Court was there concerned with suspension of Holland as an attorney rather than as a judge. And of course a state court's interpretation of that state's constitutional privilege against self-incrimination is not binding on a federal court when presented with questions of federal constitutional law.

authority is limited to suspending or removing a judge from office. See Article VI, Section 18 of the Illinois Constitution. See also, In Re Damisch, 38 Ill.2d 195, 206, 230 N.E.2d 254 (1967), holding that a disciplinary proceeding as applied to an attorney "is not a criminal prosecution." And see Bar Association of Erie County v. Gelman, 285 N.Y.S.2d 691 (S.Ct.App.Div. 1967), which is to the same effect.

Plaintiff has cited no authority for the proposition that testimony given under a grant of immunity from prosecution may not be used in a disciplinary or removal proceeding. And what authority does exist is to the contrary. In Re Ungar, 282 N.Y.S.2d 158 (S.Ct.App.Div.1967), In Re Selig, 32 A.D.2d 213, 302 N.Y.S.2d 94 (S.Ct.App.Div. 1969) and In Re Klebanoff, 21 N.Y.2d 920, 289 N.Y.S.2d 755, 237 N.E.2d 75 (Ct. of App.1968), all held that testimony given by an attorney before a grand jury pursuant to a grant of immunity may constitute a basis for taking disciplinary action. And Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d 1, 231 N.E.2d 718 (Ct. of App.1967), held that testimony given by an attorney at a disciplinary hearing, although constitutionally inadmissible in a criminal prosecution, could be used as a basis for taking disciplinary measures.

[3] Taken together, plaintiff's self-incrimination arguments amount to the claim that he can be removed neither for exercising the privilege nor for conduct to which he admitted when the privilege was protected by a grant of immunity. In effect, he is arguing that he has a federal right to remain as a judge regardless of his conduct. But there is no constitutional right to public office, United States v. Field, 193 F.2d 92, 106 (2d Cir. 1951) (separate opinion of Frank, J.), and "(t)here is no divine right of judges to flout the law." Jenkins v. Oregon State Bar, 241 Or. 283, 405 P.2d 525, 529 (1965).

Plaintiff's fourth constitutional challenge is that the Commission based its decision on "ancestoral, ethnic and vocational associations" in violation of the equal protection clause of the Fourteenth Amendment. This is a serious charge and yet no facts are cited to support it nor has any evidence whatever been adduced to substantiate it.

One final point bears mention with regard to consideration of whether plaintiff is likely to prevail on the merits. 28 U.S.C. § 2283 provides that, except in specified instances, "(a) court of the United States may not grant an injunction to stay proceedings in a State court." There appears to be a substantial question whether Courts Commission proceedings qualify as "proceedings in a State court" and, if so, whether the relief requested falls under the statute's prohibition.

[4] Based upon the foregoing analysis, this court has concluded that there is little likelihood that plaintiff will prevail upon a final hearing.

It is also significant that the preliminary relief requested is virtually equivalent to that ultimately sought, and would operate to disturb the status quo. For the injunction requested would prevent the nomination of candidates to fill plaintiff's former office and might well extend the vacancy beyond the time set for the next election. No sufficient reason has been advanced to justify this serious disruption of the State's electoral machinery.

For the reasons stated herein, this court finds that plaintiff has failed to demonstrate sufficient justification for the requested relief. The motion for a preliminary injunction is denied.